**SALMAH ABDUL RAHMAN** A

**v.**

**MOHD FAIZAL OSMAN**

HIGH COURT MALAYA, GEORGETOWN B
VAZEER ALAM MYDIN MEERA JC
[CIVIL APPEAL NO: 12A-353-2009]
30 JUNE 2010

***CIVIL PROCEDURE:*** *Judgments and orders - Consent judgment - Construction of terms - Suit against two defendants - Consent judgment entered with first defendant - Whether constituting settlement of entire claim against both defendants - Accord and satisfaction - Applicability - Subordinate Courts Rules 1980, O. 14 r. 21* C

***CIVIL PROCEDURE:*** *Striking out - Statement of claim - Whether there was accord and satisfaction - Application to strike out made more than two years after close of pleading - Whether wilful delay - Whether fatal - Subordinate Courts Rules 1980, O. 14 r. 21* D

This was an appeal against the decision of the learned Sessions Court judge striking out the plaintiff's claim against the second defendant on the ground that there was accord and satisfaction of the claim. The facts were that the plaintiff had sued the defendants for negligence/loss of dependency, when her husband rammed against a stray dog while riding a motorcycle on an Expressway managed by the first defendant, was collided into by the second defendant's motorcycle and succumbed to the injuries. Be that as it may, on 19 April 2003, the plaintiff and the first defendant entered into a consent judgment whereof the latter agreed to pay the plaintiff RM11,000 in damages and costs "sebagai penyelesaian muktamad kes ini". In the meanwhile, the second defendant proceeded to file his defence, and had apparently also acquiesced in the many adjournments of the trial. However, about three years later, on 18 August 2006, the second defendant applied to strike out the plaintiff's action under O. 14 r. 21 Subordinate Courts Rules 1980 ('SCR'), arguing, essentially, that the consent judgment constituted a full and final settlement of the plaintiff's entire claim against the defendants, thereby entitling him to rely on the defence of accord and satisfaction. The trial judge adopted the argument and consequently allowed the striking out application. The plaintiff appealed and the primary E F G H I

A questions that arose were: (i) whether the facts and circumstances of this case supported the averment of accord and satisfaction; and (ii) whether the delay to strike out the claim herein was fatal to the second defendant's application.

B **Held (allowing appeal):**

**(1)** In ascertaining whether there is accord and satisfaction of a claim, it is important to determine the exact terms of the alleged agreement or compromise. Further, the court can look at the surrounding circumstances and the conduct of the C parties to construe the intention of the parties. (paras 18 & 32)

**(2)** The consent judgment was entered into between the plaintiff and the first defendant and there is no accord and satisfaction D of the plaintiff's claim as against the second defendant. This is obvious considering that there was no consideration coming from the second defendant to the plaintiff, and further that there was no rebuttal, and therefore an admission, of the plaintiff's affidavit evidence that the solicitor for the second E defendant had acknowledged that the consent judgment was only recorded between the plaintiff and the first defendant. (paras 19-26)

**(3)** The conduct of the second defendant and his solicitor(s) prior F to and post consent judgment led to one irresistible conclusion, namely that there is no accord and satisfaction of the plaintiff's claim against the second defendant. It is inconceivable, if indeed there was accord and satisfaction, that the second defendant's solicitor who was present in court on G the material day would not have informed the court of the same, or would have taken a date to file defence and to subsequently set down the matter for trial on at least three occasions, before filing the application to strike out. In the upshot, the court would agree with the plaintiff that the words H "sebagai penyelesaian muktamad kes ini" must be construed to mean that the settlement sum paid to the plaintiff by the first defendant would be in full and final settlement of the plaintiff's case against the first defendant only and does not include the second defendant. (para 33)

I

**(4)** The second defendant's application under O. 14 r. 21 SCR is an abuse of process and ought to be construed as an attempt to delay the fair trial of the action. In any case, the unexplained delay to strike out the plaintiff's claim (more than two years after close of pleadings and after the matter had been set down for trial on several occasions) had rendered a final and fatal blow to the second defendant's application. (paras 37 & 38)

**Case(s) referred to:**

*Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC* ***(refd)***

*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC* ***(refd)***

*British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd [1933] 2 KB 616* ***(refd)***

*Ho Kam Phaw v. Fam Sin Nin [1998] 3 CLJ 708 CA* ***(refd)***

*Johor Capital Holdings Sdn Bhd v. Frank Khoo Shao Hong [2002] 6 CLJ 288 HC* ***(refd)***

*Lee Kuan Yew v. Seow Khee Leng [1985] 2 CLJ 179; [1985] CLJ (Rep) 852 HC* ***(refd)***

*Misliha Lagiman v. Linguaphone Distributors Sdn Bhd [2003] 1 LNS 598 HC* ***(refd)***

*Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors [2006] 4 CLJ 573 HC* ***(refd)***

*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***

*Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 HC* ***(refd)***

*Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC* ***(refd)***

*Raja Zainal Abidin Raja Haji Tachik & 3 Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC* ***(refd)***

*Smith v. Hughes [1871] LR 6 QB 597* ***(refd)***

*Solid Kitchen Sdn Bhd v. Aman Teguh-WICC JV Sdn Bhd & Anor [2003] 1 LNS 54 HC* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19
Subordinate Courts Rules 1980, O. 14 rr. 12(1), 21, O. 53 r. 11

**Other source(s) referred to:**

*Chitty on Contracts,* 28th edn, paras 23-024

*For the appellant/plaintiff - B Espran; M/s B Espran & Co*
*For the respondent/2nd defendant - Ong Keng Swee; M/s KS Ong & Co*

*Reported by Wan Sharif Wan Ahmad*

## JUDGMENT

**Vazeer Alam Mydin Meera JC:**

**[1]** This is an appeal from the decision of the learned Sessions Judge Butterworth striking out the plaintiff's claim against the second defendant under O. 14 r. 21 of the Subordinate Courts Rules 1980 (SCR).

**[2]** The facts of the matter are as follows:

The plaintiff is the lawful wife of Amanuallah bin Md Sherif, deceased. The deceased had on 6 March 2000 collided into a stray dog which ran into the deceased's path while riding his motorcycle along the Butterworth Kulim Expressway (BKE). Following that initial collision, the second defendant who was also riding a motorcycle had then collided into the deceased. The deceased died as a result of injuries sustained in that series of collision. The plaintiff as the lawful wife of the deceased then commenced action on 6 February 2003 in the Butterworth Sessions Court against the first defendant who is the concessionaire and manager of the BKE and the second defendant as tort feasors in an action for negligence. The plaintiff's claim is for loss of dependency, bereavement, special damages and cost. The summons was duly served on both defendants and appearance was entered.

**[3]** The first defendant was represented by the firm of Messrs Omar Bakhi, while the second defendant was originally represented by the firm of Messrs Ajmer Sandhu & Ong and subsequently by the firm of Messrs K S Ong & Co.

**[4]** The second defendant's application to strike out the plaintiff's claim arises from the following events. On 19 April 2003, the plaintiff and the first defendant entered into a consent judgment wherein the first defendant agreed to pay the plaintiff the sum of RM10,000 and cost of RM1,000 to the plaintiff's solicitors as full and final settlement of the claim between the plaintiff and the first defendant. The words used in the Malay language in the consent judgment are as follows:

> TINDAKAN INI telah dipanggil untuk perbicaraan pada 19/04/2004 di hadapan TUAN HASHIM BIN HAMZAH, Hakim Mahkamah Sesyen Butterworth, Pulau Pinang dalam kehadiran EN B. ESPRAN Peguamcara Plaintif dan EN OMAR BAKHI AHMAD Peguamcara Defendan Pertama serta J. MARTIN MAGENDRAN Peguamcara Defendan Kedua.

Maka adalah direkodkan Penghakiman Persetujuan di mana Defendan Pertama bersetuju untuk membayar kepada Plaintif sejumlah wang RM10,000.00 kepada Peguamcara Plaintif Tetuan B. Espran & Co **sebagai penyelesaian muktamad kes ini**. (emphasis added)

**[5]** When the consent judgment was entered the solicitors for the respective parties were all present in court. Upon recording the terms of the consent judgment, the learned Sessions Judge then fixed a date for the second defendant to enter defence as the second defendant had not filed his defence to the action as at the date of recording of the consent judgment. The second defendant then filed his defence on 21 July 2003. Thereafter, the trial of the action between the plaintiff and the second defendant was fixed for hearing and subsequently adjourned on several occasions.

**[6]** On 18 August 2006 the second defendant through his then solicitors, Messrs Ajmer Sandhu & Ong filed an application to strike out the plaintiff's claim under O. 14 r. 21 SCR, citing all four limbs of that rule disjunctively and further alternatively prayed under O. 53 r. 11 SCR for the suit to be struck off pursuant to the court's inherent powers. The second defendant has couched his application on the following grounds:

a. that the plaintiff had received from the first defendant the sum of RM10,000 as damages and RM1,000 in cost was paid to the plaintiff's solicitors as full and final settlement of the claim;

b. by the acceptance of the offer of settlement made by the first defendant, the plaintiff had entered into a contract for the full and final settlement of the claim and therefore the second defendant can rely on the defence of accord and satisfaction;

c. that as a result of the above the court is *functus officio* and the plaintiff is estopped from further proceeding with the claim against the second defendant; and

d. that the consent judgment entered on 19 April 2004 would mean that *res judicata* would apply in respect of the plaintiff's claim against the second defendant.

**[7]** A *fortiori*, the second defendant submits that the plaintiff's claim against the second defendant is an abuse of process. The learned Sessions Judge accepted the second defendant's arguments and allowed the second defendant's application to strike out the plaintiff's claim. The plaintiff being dissatisfied with that decision now appeals to this court.

**[8]** Mr K S Ong, the learned counsel for the second defendant argues in this appeal that by the words of the consent judgment as recorded there is accord and satisfaction of the plaintiff's entire claim against both the first and second defendants. Therefore, Mr Ong submits that the plaintiff is estopped from pursuing the claim against the second defendant. In support of his argument, Mr Ong referred to the judgment of Syed Ahmad Helmy JC (now a Court of Appeal Judge) in the case of *Misliha binti Lagiman v. Linguaphone Distributors Sdn Bhd* [2003] 1 LNS 598 and in particular to the following passage:

> This defence is commonly known as "accord and satisfaction" and moves on the pretext of simple contract law and Keith R Evans in his book, the *Law of Defamation in Singapore and Malaysia*, 2nd Edition (p 97) puts it thus:
>
> > That valuable consideration can take the form of promise to do certain things, in which case the acceptance of the promise will discharge the claim.

**[9]** Mr Ong had also referred the court to the judgment of Rohana Yusuf JC in the case of *Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors* [2006] 4 CLJ 573 in support of his argument. Based on the consent judgment, Mr Ong also submits that the doctrine of issue estoppels would apply and relies on decision of the *Court of Appeal in the case of Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 for this proposition.

**[10]** Mr Ong further argues that the Sessions Court has become *functus officio* following the recording of the consent judgment because the final order has been made, drawn up and perfected. Therefore, in conclusion, Mr Ong submits that the plaintiff's claim against the second defendant is an abuse of process as the matter is now *res judicata*.

**[11]** Mr B Espran, learned counsel for the plaintiff on the other hand argues that the second defendant's arguments are misconceived in law and in fact. Mr Espran in support of his contention that the appeal ought to be allowed states the following:

i. the second defendant filed his notice of appearance on 16 April 2003 that is three days before the consent judgment was entered;

ii. the second defendant played no part in the negotiations between the plaintiff and the first defendant leading to the entering of consent judgment;

iii. the second defendant was never a party to the settlement agreement between the plaintiff and the first defendant and that the consent judgment was only between the plaintiff and the first defendant. The plaintiff had never intimated to the second defendant or to the first defendant that the consent judgment would be in satisfaction of the entire claim against both the first and second defendants;

iv. the second defendant's then counsel, Mr J Martin Magendran who attended court on 19 April 2003 when the consent judgment was entered knew very well that the consent judgment was only in respect of the plaintiff's claim against the first defendant. That is why Mr Magendran sought a mention date for the second defendant to file his defence;

v. the second defendant subsequent to the recording of the consent judgment, filed his defence on 21 July 2003 and in his defence the second defendant did not plead the defence of accord and satisfaction; or issue estoppels; or *res judicata*; and

vi. the application by the second defendant to strike out the plaintiff's claim was filed only on 18 August 2005 as an afterthought more than two years after the recording of the consent judgment during which period the court had listed the action for trial on at least three successive occasions and parties had come to court for trial.

**[12]** Therefore, Mr B Espran argues that there is no accord and satisfaction of the plaintiff's claim against the second defendant and as such the doctrine of issue estoppels does not apply.

**[13]** After having perused the record of appeal and the written submissions of both learned counsel as well as having heard oral arguments in court, I am inclined to allow this appeal. Let me explain the reason.

**[14]** A good starting point would be to look at the definition of accord and satisfaction by referring to the oft quoted judgment of Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd* [1933] 2 KB 616, where it was concisely described as follows:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

**[15]** This was applied by the Court of Appeal in the case of *Ho Kam Phaw v. Fam Sin Nin* [1998] 2 MLJ 713 at 728, where Dennis Ong JCA, after having referred to the above passage in British Russian Gazette added by reference to *Chitty on Contracts General Principles* (now found at para 23-013 in the 28th edn) on compromise that:

> ... In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms, and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim ... .

Further at para 23-022, on the evidence leading to accord:

> The question whether there has been an accord and satisfaction is a question of fact ... . The construction of any correspondence which, it is alleged, evidences the accord is, however, a question of law.

Further, *Chitty on Contracts General Principles* (28th edn at para 23-024) in relation to compromise and consent judgment states that:

> A compromise may by consent be made the subject of a judgment or order of the court. A consent judgment will ordinarily extinguish by merger the contract of compromise ...

**[16]** According to Ramli Ali J (now a Court of Appeal judge) in the case of *Solid Kitchen Sdn Bhd v. Aman Teguh-WICC JV Sdn Bhd & Anor* [2003] 1 LNS 54:

> The approach the court should take whether there has been 'accord and satisfaction' both in law and fact is well settled and the best exposition of it appears in Roskill J's judgment in *Margaronis Navigation Agency Ltd v. Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at p 318:
>
> > Where the question arises whether a particular obligation has been performed, the first thing that has to be done is to ascertain the nature of the obligation. That depends on the construction of the contract, and the construction of the contract is, of course, a question of law; but that is only one part of the equation. Having ascertained what the obligation is, one then has to measure the performance, and see whether the performance fulfils the obligation. That again ultimately is either a question of law or a question of mixed fact and law; not perhaps in every case, but in a great many cases.

**[17]** In adopting the above passage the Singapore High Court in *Lee Kuan Yew v. Seow Khee Leng* [1985] 2 CLJ 179; [1985] CLJ (Rep) 852 held that:

> The importance of ascertaining the exact terms of compromise or 'obligation', as Roskill J puts it, is that it determines the question of whether or not the plaintiff can rely on his original cause of action. If, for instance, the promised or actual forbearance to pursue the claim is construed as being in return for the promised performance of some act by the other, or whom I would call the offending party, the agreement will be regarded as one involving the immediate discharge of the claim. But if the promised or actual forbearance is construed as being in return for actual performance of some act by the offending party, the claim forborne will not be discharged until such performance takes place, (see, *British Russian Gazette*'s case, *supra*); and if in this respect the offending party fails to perform the terms of the compromise, the other party has an option to either accept the offending party's repudiation of the compromise and re-assert his original claim or affirm the compromise and sue upon it.

**[18]** Therefore, it is clear from the authorities quoted that in ascertaining whether there is accord and satisfaction of a claim, it is important to determine the exact terms of the alleged agreement

A or compromise. In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court on the question of construing the existence of an agreement held quoting the case of *Smith v. Hughes* [1871] LR 6 QB 597, [1861-73] All ER Rep 632
B as follows:

> In *Smith v. Hughes* it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be *ad idem*, ie there must be a consensus between them.
>
C
>
> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities
D show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
>
> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test;
E more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.
>
> As clear and helpful an enunciation of the principles as any which should guide the court in determining the ever-recurring question
F of whether there has been a contract between the parties is provided by Saville J in *Vitol BV v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 at p 576 in the following words:
>
> > The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively
G to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not
H so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it
I may simply remain impossible to give the words any

> sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

**[19]** Now applying the above principles, I find that the consent judgment entered on 19 April 2003 is only between the plaintiff and the first defendant. Consequently, there is no accord and satisfaction of the plaintiff's claim against the second defendant. This is very obvious from the following facts.

**[20]** Firstly, in the consent judgment, the first defendant agrees to pay the sum of RM10,000 as damages and RM1,000 as cost to the plaintiff and her solicitors respectively. There is no absolutely no evidence of consideration flowing from the second defendant to the plaintiff. In fact the affidavit in reply filed by Mr B Espran for the plaintiff he makes the following categorical assertion:

> Saya juga merujuk kepada perenggan 7 afidavit tersebut dan menyatakan bahawa peguam defendan kedua sendiri telah mengaku bahawa Penghakiman Persetujuan hanya direkodkan dengan defendan pertama saja. Jadi kes ini hanya diselesaikan setakat defendan pertama saja dan bukannya keseluruhan kes diselesaikan.

**[21]** This positive assertion was never refuted by the second defendant. Therefore, the failure of the second defendant to rebut or contradict the positive assertion of the plaintiff that the compromise leading to the consent judgment was only between the plaintiff and the first defendant should be treated as an admission by the second defendant of the fact so asserted. This evidential principle was very clearly enunciated by Shankar J (as he then was) in the case of *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332, as follows at p 332:

> Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.
>
> Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales.

**[22]** This principle has subsequently been reiterated in several other cases including *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 and *Johor Capital Holdings Sdn Bhd v. Frank Khoo Shao Hong* [2002] 6 CLJ 288.

**[23]** Secondly, the second defendant's counsel Mr J Martin Magendran, who attended court when the consent judgment was entered had on the very date taken a mention date to file the second defendant's defence. If there was accord and satisfaction between all parties to the suit following the settlement agreement between the plaintiff and the first defendant, then surely the second defendant's counsel would not have taken a date to file defence. Further, the second defendant who had the opportunity to file his defence after the recording of the consent judgment did not plead the defence of accord and satisfaction in his defence. This lends weight to the plaintiff's submission that the second defendant's application is an afterthought based solely on the misinterpretation of the words "sebagai penyelesaian muktamad kes ini" in the consent judgment to include the case against the second defendant as well.

**[24]** Thirdly, on 21 July 2003 the second defendant's defence was filed by his solicitors. If indeed there was accord and satisfaction there is no reason for the second defendant to file defence to the plaintiff's action after the recording of the consent judgment.

**[25]** Fourthly, the draft consent judgment as exhibited in the record of appeal has the approval of only the plaintiff and the first defendant's solicitors. If the second defendant was a party to that settlement agreement, then the second defendant's solicitors would also have been a party to approve the terms of the consent judgment in its draft form as is the practice.

**[26]** Fifthly, the court would not have fixed hearing dates one after another for a period of two years after the recording of the consent judgment if indeed it was in satisfaction of the entire claim against both defendants and for that matter the second defendant's solicitors would not have taken successive hearing dates for two years and then suddenly realise that there is accord and satisfaction of the plaintiff's claim.

**[27]** As can be seen, the defence of accord and satisfaction is based on contractual principles. If a claimant has agreed to forebear or waive his rights to sue or to discontinue an action against a defendant in return for some proper consideration flowing from the defendant, then that agreement would be a valid defence to any action brought by the claimant even if the compromise was made by a third party on behalf of a defendant to an action.

**[28]** This principle was applied by the Supreme Court in the case of *Raja Zainal Abidin Raja Haji Tachik & 3 Ors v. British- American Life & General Insurance Bhd* [1993] 3 CLJ 606. In that case the defendants, being beneficial owners of shares in a company, sold their respective shares or shareholdings in the company to the plaintiff by an agreement dated 15 February 1985. Under the sale agreement, the defendants undertook, jointly and severally, to pay the plaintiff sums of money which represented the shortfall in the combined operating profits and the total value of the total assets of the company and its subsidiaries. The seventh defendant and a subsidiary of the plaintiff entered into negotiations for settlement after the suit had been filed. The seventh defendant proposed to pay certain sums in full and final settlement, one of the conditions being that the plaintiff shall withdraw the suit against all the defendants. This proposal was accepted by the subsidiary of the plaintiff on behalf of the plaintiff without qualification and the sums proposed to be paid were duly paid. Relying on the settlement the defendants applied to strike out the plaintiff's statement of claim, under O. 18 r. 19 Rules of the High Court 1980 (RHC 1980), on the grounds that the statement of claim was scandalous, frivolous and vexatious or that it would prejudice, embarrass and delay the fair trial of the action. The plaintiff on the other hand, contended that the settlement could not operate as a release of the defendants from the plaintiff's claim in the suit. The registrar allowed the defendants' application which was reversed by the learned High Court Judge. The defendants appealed to the Supreme Court.

**[29]** In that case the Supreme Court was of the opinion that on the face of the unambiguous agreement reached by the seventh defendant and the plaintiff which clearly stated that the suit against all defendants are to be withdrawn in consideration of the seventh defendant paying the proposed settlement sum which was duly paid, there is accord and satisfaction of the claim and the plaintiff shall be precluded from continuing to maintain the action against the defendants.

**[30]** Peh Swee Chin SCJ delivering the unanimous decision of the Supreme Court observed at p. 610 of the judgment that:

> … it is the sole function of the Court to construe a document with a view to finding the intention of the parties. The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation, …

**[31]** Therefore, from the clear words of the agreement in that case the Supreme Court construed the document with the view of finding the true intention of the parties and concluded that the agreement between the plaintiff and the seventh defendant had the effect of binding the plaintiff *vis-à-vis* the rest of the defendants.

**[32]** In our present case, there is no clear and unambiguous agreement spelling out the terms of the settlement reached between the plaintiff and the first defendant. The second defendant merely relies on the last few words in the consent judgment to anchor his argument that there is accord and satisfaction of the plaintiff's claim against the second defendant. In the absence of clear and ambiguous agreement, the court can look at the surrounding circumstances and the conduct of the parties to construe the intention of the parties.

**[33]** The conduct of the second defendant and his solicitors prior to and post consent judgment leads to one irresistible conclusion and that is there is no accord and satisfaction of the plaintiff's claim against the second defendant. The plaintiff had never agreed to withdraw or discontinue the action against the second defendant when the consent judgment was entered. It is inconceivable that the second defendant's solicitors had two years after the recording of the consent judgment suddenly woken up to the fact that there is accord and satisfaction of the claim. If indeed there was accord and satisfaction, the second defendant's solicitor who was present in court on the day when the consent judgment was entered would have informed the court of the same and would have not taken a date to file defence and to subsequently set down the matter for trial not once but at least on three occasions before the second defendant filed his application to strike-out the plaintiff's claim. In this regard, I accept the submissions made by learned counsel for the plaintiff.

Therefore the words, "sebagai penyelesaian muktamad kes ini" must be construed to mean that the settlement sum paid to the plaintiff by the first defendant would be in full and final settlement of the plaintiff's case against the first defendant only and does not include the second defendant.

**[34]** In the cases referred to by the learned counsel for the second defendant, namely *Misliha binti Lagiman v. Linguaphone Distributors Sdn Bhd (supra)* and *Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors (supra)*, the contractual terms on which the defendants relied in those cases were clear and unambiguous to found the defence of accord and satisfaction thus leading to the court striking out the plaintiffs' case under O. 18 r. 19 Rules of the High Court. However, it is not the same in our present case for me to exercise my discretion under the equivalent O. 14 r. 21 of the Subordinate Court Rules to strike out the plaintiff's claim against the second defendant.

**[35]** In the premise, the second defendant's argument that the plaintiff is estopped from pursuing the claim against the second defendant cannot stand. The court is not *functus officio* as the consent judgment has not extinguished the plaintiff's claim against the second defendant. There is no abuse of process by the plaintiff. To the contrary it is the second defendant's present application under O. 14 r. 21 SCR which is an abuse of process and ought to be construed as an attempt to delay the fair trial of the action.

**[36]** Therefore, taking into account the totality of the evidence, the conduct of the second defendant and his solicitors, the words "sebagai penyelesaian muktamad kes ini" in the consent judgment can only be construed to mean that the payment of the settlement sum by the first defendant is in full and final settlement of the claim against the first defendant only. The second defendant cannot read into the consent judgment matters that are patently untrue or non-existent.

**[37]** Another point raised by the learned counsel for the plaintiff is also worthy of note. The second defendant filed his application to strike out the plaintiff's claim more than two years after the close of pleadings and after the matter had been set down for trial on several occasions. The second defendant did not give any

reasons for the delay despite the plaintiff's challenge in this regard. plaintiff's counsel refers to the case of *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 4 CLJ 857 where Abdul Malik Ishak J (now a Court of Appeal Judge) held that:

> … an application to strike out a pleading should be made at the earliest opportunity, and should not be entertained at the commencement of the trial after the costs of preparation had been incurred save in a most exceptional case and on receipt of a valid explanation for the lateness of the application, that in the circumstances, the judge could not properly have exercised his discretion by ordering the defendant's pleadings to be struck out at so late a stage.

**[38]** I agree with the learned counsel for the plaintiff. Procedurally, this unexplained delay has rendered a final and fatal blow to the second defendant's application. Not that it was needed as the second defendant's application had already floundered on its merits.

**[39]** I am mindful of the long line of authorities which have laid down the principle that the discretionary powers under O. 14 r. 12(1) SCR and O. 18 r. 19 RHC or the inherent powers to dismiss an action on the basis of abuse of the process ought to be very sparingly exercised, and only where the claim or defence is obviously unsustainable on the face of it. The present case is not one which is obviously unsustainable or an abuse of process.

**[40]** Therefore, I allow this appeal with cost, and order as such. The matter is remitted back to the Sessions Court for trial.